United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

544

BRIEF FOR APPELLANT

IN THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT ********

No. 23,848

UNITED STATES OF AMERICA,

v.

WILBERT L. MAVINS,

Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA*****

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Washington, D. C.
Counsel for Appellant
Appointed by this Court

April 28, 1970

INDEX

TABLE OF AUTHORITIES

QUESTIONS PRESENTED

1. Does the Sixth Amendment permit a Court Appointed Counsel of Record to designate a "stand in" counsel to appear in his stead at the time of sentencing of the accused but without the accused consent although approved by the Court?

2. Did the District Court lose jurisdiction to proceed with the sentencing of the accused where the Court Appointed Counsel of record for the Accused failed to appear and a"stand in" counsel designated by him appeared in his place and without the consent of the accused?

REFERENCE TO RULINGS--NONE. THIS CASE HAS NOT PREVIOUSLY BEEN BEFORE THIS COURT

IN THE UNITED STATES COURT OF APPEALS FOR

THE DISTRICT OF COLUMBIA

CIRCUIT

WILBERT L. MAVINS,	)	
Appellant,	)	
v.	)	No. 23,848
UNITED STATES OF AMERICA	)	
Appellee.	)	

BRIEF FOR APPELLANT

STATEMENT OF JURISDICTION OF THE COURT

This is an appeal from a judgment of conviction, based on a plea of guilty, to the offense of: Assault with intent to commit robbery while armed, (22 D. C. Code 501; 22 D. C. Code 3202), before PRATT, J., in the United States District Court for the District of Columbia.

Appellant is proceeding in FORMA PAUPERIS, pursuant to an order of the United States District Court for the District of Columbia, PRATT, J. dated December 5, 1969. The jurisdiction of this court is invoked under Rule 41 of the General Rules of this Court and Title 28, United States Code, Section 1291.

STATEMENT OF THE CASE

Appellant was charged with Violation of 22 D. C. Code Sections 3202, 502, and 3204. The indictment was in nine counts. All of the offences occured on April 24, 1969.

Upon advise and assistance of his originally appointed counsel he agreed to plead guilty to count one of the indictment with the understanding with his said counsel that such a plea would likely result in the Court dismissing the other eight counts of the indictment and would otherwise be to the advantage of the Appellant under the circumstances. At the time of the agreement of Appellant to enter a plea of guilty to count one aforesaid, he had every reason to believe that said counsel would be present at the sentencing and would likely explain to the Court the circumstances which brought about appellant's decision to plead guilty to one count of the nine count indictment since he had previously entered a plea of not guilty to all nine of said counts. Such an explanation Appellant had reason to believe might tend to help reduce the penalty to be imposed upon him by his plea to count one of the indictment. And especially if it was made by the counsel who was responsible for suggesting that such a plea be made, by the Appellant.

On November 25, 1969 the date set for sentencing, Appellant appeared in Court.

His original counsel however did not appear. In his stead however was a stand in attorney who identified himself to the Court as follows:

" Mr. _____: Your honor, I am not the attorney of record. Mr. _____, in our office is the attorney of record. He has asked me to stand in. However if you would prefer to have Mr._____ here at the time of sentencing--- "

" THE COURT: No, I think you are perfectly competent to handle this, Mr._____. We have a full presentence report on this gentleman"

Further proceedings before the District Court at the time of the sentencing are set out herein in the APPENDIX to this brief.

Appellant's plea of not guilty was entered August 29, 1970. His withdrawal of said plea was made on October 10, 1970 and his plea of guilty to Count one of the indictment was made on October 10, 1970. Sentencing proceedings occured on November 25, 1970. Notice of Appeal to this Court was filed December 4, 1969.

On November 25, 1969, the District Court, Pratt, J. sentenced appellant to a term of 4 to 12 years, on Count one of the indictment, to wit: Assault with intent to commit robbery while armed. At the time of the sentencing Appellant was confined to the D. C. Jail, awaiting transfer to LORTON REFORMATORY, Lorton Virginia.

STATEMENT OF POINTS

1. Effective assistance of counsel was denied appellant where his original counsel did not appear and their was no explanation or excuse for his absence and no prior notice given appellant or the court or approval of the court secured in advance of the sentencing proceeding.

2. The District Court erred in approving the tacking of defence counsel without particular facts made of record justifying such action and with the record approval of the accused.

SUMMARY OF ARGUMENT

Our Supreme Court has frequently said an accused is entitled to a fair trial in all criminal proceedings. It has also said that an accused is entitled to the assistance of counsel in all such proceedings. These holdings need no citation. They are consistent with the literal wording of the United States Constitution itself.[1]

In the processing of a criminal trial the time of sentencing is most crucial. It is this time of the trial that a judge needs all the help he can secure from all counsel who have participated in the trial, both prosecution and defense. In the instant case the Counsel for Appellant was not present at the sentencing. Since the attorney for the defense as well as the attorney for the state are officers of the Court in the particular trial they are engaged in conducting and since the trial commences with the joining of issues and terminates with the judgment or sentence,

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1/ VI Amendment. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, AND TO HAVE ASSISTANCE OF COUNSEL FOR HIS DEFENSE."

it is imperative and constitutionally necessary that counsel who conducted the case be present at the conclusion thereof. In this regard it would seem as necessary for such counsel be present as it would be for the presiding judge. Both the judge and the counsel are integral parts of a Constitutional Court. This is true also of jurors. But an accused consent is necessary for the substitution of an alternate. 2/

True an accused may waive his right to assistance to a certain counsel, just as he may waive the substitution of a juror who on account of illness or some other justifiable cause is excused with the consent of the accused.

Here we have no such consent of the appellant for a stand in counsel .. It was imposed upon him at a crucial moment in his trial. There is no authority for such tacking of counsel in the Sixth Amendment. There is no basis for such tacking in the instant case as a matter of fact. No excuse was given for the non-appearance of appellant's counsel. Appellant need not show harm from such procedures. Sufficient it is believed to look at the record and the constitutional provisions involved. They require assistance of the counsel in charge of the case from beginning to end. 3/ Here counsel went only part way and was absent at the crucial time of sentencing.

Accordingly the judgment of the District Court should be vacated.

2/ Robinson vs. U. S. C. C. A. Ky 1944, 144 F. 2d. 392, cert. den. 65 S. Ct. 910, 324 U. S. 850, 89 L. Ed. 1410.

3/ Evans v. Rives, 1942, 126 F. 2d. 633, 75 U. S. App. D. C. 242.

ARGUMENT

POINT ONE:

It is academic that an accused is entitled to the assistance to counsel at every stage of a criminal proceeding. The imposition of a sentence is such a stage. We use no special argument to show that counsel,as that term is used in the Sixth Amendment, was not present in the instant case. Let's call him what he called himself and as he identified himself to the Court, to wit: "I am not the attorney of record. Mr. _____, in our office is the attorney of record. He has asked me to stand in ***"

We believe the District Court ignored the constitutional mandate of according the appellant the assistance of counsel required by the Sixth Amendment at the time of the sentencing. This duty this Court has held is positive and affirmative. Evans v. Reeves, supra.

Appellant was thusly denied such assistance in the instant case as appears on the face of the record.

POINT TWO:

The District Court was advised that appellant's duly appointed counsel was not before the Court at the time of the sentencing. Neverthless he proceeded with the

case without seeking the consent of the appellant as to the possible substitution of the "stand in" attorney as the attorney of record for appellant. No authorization was sought from the appellant. Appellant in no manner waived his right to have his attorney of record present at the sentencing. Under these circumstances it is clear that the District Court was without jurisdiction to proceed and its' action in imposing the sentence upon appellant is VOID FOR WANT OF JURISDICTION.

As previously discussed a Criminal Court consists of certain persons in the trial of an accused and one of those persons is the defendant's counsel. Without his presence the court is not complete and is without jurisdiction, to proceed. The exception to this rule is where there is an intelligent waiver by a defendant of right to counsel, in which event it is the duty of the Court to appoint competent counsel for defendant and if it does not do so it loses jurisdiction to proceed. Martin v. U. S. C. A. Tex. 1950, 182 F. 2d. 225, cert.. den. 71, S. Ct. 200, 340 U. S. 892.

Here the appellant's counsel was absent. There was no counsel appointed with his consent to represent him at the sentencing. The Court was thus without jurisdiction to proceed. Indeed only the counsel who was absent could have properly represented him at that time. For it was the absent counsel who negotiated

the appellant's plea of guilty to Count One of the indictment and knew all the facts incident thereto. And was capable of pointing out to the Court the nature of the guilty negotiations as to such plea. This involved confidential matters between appellant and his counsel of record. Obviously a "stand in" counsel could not properly do the job. Nor does the Sixth Amendment permit such ineffective assistance of counsel in a criminal proceeding.

In passing on this question now before the Court, it is believed that this court should clearly hold that the Sixth Amendment does not permit the tacking of counsel without the clear consent of the accused and then only for good cause shown why the attorney of record cannot be present to complete the proceeding of which he is an intregal part.

There was no waiver here by appellant to have his attorney of record, present at the sentencing. It is clear that if an accused does not have assistance of counsel when entering--plea of guilty or when sentence is imposed, it must be manifestly clear to the Court that he has competently and intelligently waived his right to counsel. Willes v. Hunter, CCA Kan. 1948, 166 F. 2d. 721, cert. den. 68 S. Ct. 1499, 334 U. S. 848.

CONCLUSION

The judgment of the District Court should be vacated.

Michael M. Kearney
1329 E. Street N. W.
Munsey Building
Washington, D. C.
Counsel for Appellant
Appointed by this Court

CERTIFICATE OF SERVICE

I, Michael M. Kearney, hereby certify that on April 29, 1970, I sent regular mail a copy of the within Brief to the Office of the United States Attorney For the District of Columbia, United States Courthouse, Washington, D. C.

Michael M. Kearney

APPENDIX

Sentence Proceedings November 25, 1969, before the Honorable

JOHN PRATT, U. S. District Judge

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

UNITED STATES	)	
	)	
V	)	Crim. No. 1358-69
	)	
WILBERT L. MAVINS,	)	
	)	
Defendant.	)	

Washington, D. C.

November 25, 1969.

The above cause came on for SENTENCING before THE HONORABLE JOHN PRATT, U. S. District Judge.

Appearances:

For the Government:

JOHN, EVANS, ESQ., Asst. U.S. Attorney

For the Defendant:

LEO ROMERO, ESQ.

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THE DEPUTY CLERK: Case of Wilbert L. Mavins. Mr. Leo Romero for the defendant, Mr. John Evans for the government.

MR. ROMERO: Your Honor, I am not the attorney of record. Mr. Ritchie in our office is the attorney of record. He has asked me to stand in. However, if you would prefer to

have Mr. Ritchie here at the time of sentencing --

THE COURT: No, I think you are perfectly competent to handle this, Mr. Romero. We have a full presentence report on this gentleman.

MR. ROMERO: Mr. Ritchie has instructed me as to what he wanted to represent to the Court at this time on behalf of Mr. Mavins. He wanted me to point out that Mr. Mavins is 19 years old, he has been a lifelong resident of the District of Columbia. He has been on personal bond while awaiting trial, pled guilty and remained on personal bond awaiting sentencing. Since July when he was released on his personal bond he has been in no trouble at all. At the time of his arrest the defendant was living with his common law wife and their child, who is now 11 months old. Both of these people are here in court today. In addition his mother and his sister are in court. Since his release on personal bond he has been living with his mother. Mr. Mavins has been working since his release on personal bond and he is currently employed at Goodwill Industries. Mr. Mavins has no history of narcotics or alcohol addition nor does he have any history of any mental difficulties. Mr. Mavins has no adult police record and his only record as a juvenile was a petit larceny violation in September of 1966 for which he was placed on probation. He was released from that probation, successful probation, on June 7, 1968.

At a prior bond hearing the Assistant United States Attorney in the grand jury section reported to the Court that

defendant was on probation in the Juvenile Court for a house-breaking violation at the time of his offense. Mr. Ritchie checked this out in the Juvenile Court and found it to be erroneous and it is for this reason that Mr. Ritchie did want to see the probation report to make sure that there was no misrepresentation insofar as Mr. Mavins' status at the time of his arrest, at the time of the offense in this case.

THE COURT: Is there anything you want to add to that, Mr. Mavins?

THE DEFENDANT: Your Honor, I would like to know if I could have another chance to undo what I have done, to try to make up if I can. I will get a part time job to help the people for what I have done. I would like to have another chance to take care of my family. It's no one to take care of the baby. My mother's girlfriend has a large family of her own. She can't get a job because she is too young.

MR. ROMERO: Your Honor, Mr. Mavins is a first offender with the exception of this Juvenile Court petit larceny charge. He is 19 years old and Mr. Mavins has expressed to Mr. Ritchie that he would be willing to make some sort of restitution, some sort of help to the victim of the shooting in this case. Considering these factors and the fact that he has stayed out of trouble and has been working while free on bond, Mr. Ritchie and I would join in asking the Court to consider Mr. Mavins forprobation or in the alternative for the Youth

Corrections Act.

THE COURT: Mr. Mavins, in connection with your plea to assault with intent to commit robbery while armed, in the course of which you shot a man who is paralyzed and who might well have died and you might have been up here in connection with murder, it is the judgment of this Court that you serve a term of not less than four nor more than twelve years.

MR. EVANS: Your Honor, in the Mavins case I ask the Court that we move to dismiss the remaining counts of the indictment.

THE COURT: Very well

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Certified as the official transcript of proceedings.

Gerald Nevitt